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A MUNICIPALITY'S RIGHTS AND RESPONSIBILITIES UNDER THE WISCONSIN MUNICIPAL LABOR LAW

BY CHARLES C. MULCAHY*

INTRODUCTION TO THE LAW

Several landmark attempts have been made by the Wisconsin legislature to establish a uniform system of employer-employee rights and responsibilities for both government and industry.¹ The 1959 legislature enacted subchapter IV of Chapter 111 of the Wisconsin Statutes. Chapter 111 deals with employee relations and subchapter IV grants certain employees the right to organize and join labor organizations. Thereafter the 1961 legislature enacted amendments to the subchapter which provided for participation by the Wisconsin Employment Relations Board (WERB) in a manner to be described herein.

The amended subchapter requires the municipality to bargain with municipal employees on questions of wages, hours and conditions of employment. Provision is made in the statute for mediation and fact finding by the WERB. Following investigation by the WERB as to whether an actual fact finding situation is presented, the WERB appoints from a panel, a qualified, disinterested person or persons to function as fact finder. He submits written findings of fact and recommendations for solution to the municipal employer and the union. No provision is made in the statute to make the fact finding binding. Such a provision would constitute binding arbitration.

POSITION OF THE MUNICIPALITY

Despite these legislative enactments, certain dissimilarities exist with respect to labor matters in industry and government.² Government personnel making labor determinations, particularly at the local level, are frequently elected officials. In many districts these elected officials require the support of labor. Industry, in contrast, is solidly behind

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¹ Although Wisconsin may be considered the front runner with respect to municipal employee labor legislation, several states have recently enacted comprehensive municipal labor legislation. On June 4, 1965, the Governor of Connecticut signed Public Act No. 159 of the Connecticut Legislature titled "An Act Establishing a Municipal Employees Relations Act." Thereafter the Michigan Legislature passed Public Act 379 which is titled "An act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; and to prescribe means of enforcement and penalties for the violation of the provisions of this act." This act was signed by the Michigan governor on July 23, 1965.

² Wis. Stat. §111.70 does not apply to employees of the State government.

management and presents a unified position at the bargaining table. Moreover, while industry is confronted with cost, sales and profit factors, government is never in danger of going out of business. Government has the problem of no guaranteed continuity of key management personnel.

Government officials must exercise greater flexibility and ingenuity, therefore, to arrive at a workable procedure for dealing with municipal labor matters. The only alternative is to resist application of the existing law. Arguments of unconstitutionality (illegal delegation and challenge of sovereignty) may sound temporarily appealing to a government official who is set in his ways but judicial rulings are steadfastly affirming municipal labor legislation.

Certain legislative and procedural changes should be considered by a municipality facing bargaining. Milwaukee County has adopted legislation empowering its five man personnel committee to take charge of all labor negotiations with the final labor agreement coming to the full County Board for approval or rejection.³ This approach is intended to

³ General Ordinances of Milwaukee County, ch. 80 (1965) provides as follows:

- Section 80.01 Function of the Personnel Committee. In addition to the duties prescribed in Section 1.24(3)(o), the Personnel Committee shall have charge of all matters arising under Chapter 111, Wisconsin Statutes.
- Section 80.02 Election, Certifications and Decertification. The Personnel Committee shall direct the conduct on behalf of Milwaukee County of all proceedings ordered by the Wisconsin Employment Relations Board relative to the election, certification and decertification of collective bargaining units, including proceedings for the determination of the number of employees, type of bargaining unit and eligibility of employees in the classified service, to participate in such elections.
- Section 80.03 Collective Bargaining. Collective bargaining with certified bargaining units shall be carried on by the Personnel Committee which shall adopt, and thereafter may amend, rules and procedures governing the conduct of such bargaining not in conflict with Section 1.28 of the General County Ordinances. Department heads and supervisory personnel shall not distribute to employees under their supervision any written communication bearing upon the subject matter or program of such collective bargaining or other employment relations matters, unless such communication shall have the prior approval of the corporation counsel.
- Section 80.04 Agreement. The agreements reached at the conclusion of such collective bargaining shall be reduced to writing by the committee and submitted in the form of a proposed ordinance or resolution to the County Board for its approval or rejection.
- Section 80.05 Enforcement. After approval or adoption of such ordinance or resolution, the corporation counsel is authorized to institute legal proceedings to enforce such ordinance or resolution and to prevent employees from engaging in practices prohibited by law.
- Section 80.06 Public Hearing. After the certified bargaining unit has presented its demands, which will be the subject to collective bargaining, such demands shall be discussed at a hearing or hearings called by the Personnel Committee for such purpose and all interested persons may appear and state their views thereon.

promote efficiency and curtail unnecessary politics in personnel matters by authorizing this committee to make necessary administrative decisions without calling special meetings of the elected body. Although the ultimate decision must depend upon the political situation confronting municipal officials, delegation of the authority in administrative personnel matters to a small personnel committee of elected officials is worth exploring. Following this decision, the bargaining policies and procedures must be clarified. The committee should adopt these policies and procedures to provide for unique and changing situations.

Whether elected officials should participate in labor negotiations presents an interesting dilemma. This decision hinges upon the political situation. Elected officials in urban areas, where the strength of labor

Section 80.04 provides for approval or rejection of the agreements reached at the conclusion of collective bargaining in the form of an ordinance or resolution. Although Section 111.70(4)(i), Wis. Stats. provides the settlement reached in negotiations may be an ordinance, resolution or contract, the selection of the particular format is left to the discretion of the municipal employer. Thus the selection in the opinion of the writer is not the subject of collective bargaining but instead is a matter for action by the municipality. There are numerous reasons why a municipality should act within the format of an ordinance or resolution and not a contract:

- (1) Resolutions or ordinances relative to wages, hours and conditions of employment usually confer permanent benefits upon municipal employees. Negotiations are directed specifically to an addition or change in such policies. Introduction of the signed contract will only serve to set time limits on negotiated benefits and confront the municipal employer with "no contract-no work" situations. This was not the legislative intent of Section 111.70, Wis. Stats.
- (2) Under Section 111.70, Wis. Stats., there must be a "completion" of a settlement following negotiations before the understandings reached in negotiations can be reduced to writing. Therefore, the employees' benefits agreed upon in negotiations are the same whether recorded in a resolution, ordinance or contract.
- (3) Municipal labor contracts tend to follow the form and text of the collective bargaining agreement in private industry. It is natural for the labor organizations to wish to impress their membership with their accomplishments in negotiations. Mere bulk of text can be impressive. This is accomplished by adding clauses of no practical significance (usually called "window dressing") or clauses which merely repeat obligations of the municipality expressed in the body of existing board resolutions. If the municipality employs an ordinance or resolution such clauses would stand out as matters not negotiated or otherwise inappropriate as surplusage.
- (4) A municipality normally has two kinds of management rights, those specifically delegated by legislative authority and those implicit in functional responsibility. These management rights therefore are not proper subjects for collective bargaining. If a solution involving a management right is made a provision of the collective bargaining contract, such provision would subject the municipality to assertions that the voluntary solution of the management problem constituted a relinquishment of the entire management right. The resolution format would provide the opportunity for adequate discussion as to the solution of a management problem without the danger of loss of a management right through contract interpretation.

Section 80.05 provides for enforcement of the ordinance or resolution and to prevent practices prohibited by law. The corporation counsel (without authority from the elected body) is authorized to institute legal proceedings for enforcement. This authorization is necessary for immediate action and guarantees enforcement by the municipality. Procrastination by elected officials, particularly in urban areas, should be eliminated.

is formidable, are confronted with increased problems when they conduct labor negotiations. In urban areas, therefore, although elected officials may delegate actual bargaining to skilled staff personnel, they may also choose to supervise the bargaining closely.

The problems arising from delegation of bargaining to staff personnel are far outweighed by greater proficiency, objectivity and continuity. Elected officials are rarely trained in personnel matters. They are subject to numerous pressures which make rendering impartial decisions extremely difficult. Further, elected officials offer no guarantee of continuity for future bargaining sessions. Many municipalities therefore have delegated the negotiating function, within certain guidelines, to a skilled staff of legal and personnel experts. Following these initial legislative determinations, the municipality is ready to face the initial petition by an employee organization for certification as bargaining agent.

INITIAL PETITION FOR CERTIFICATION

Under section 111.70(4)(d) of the Wisconsin Statutes

Whenever a question arises between a municipal employer and a labor union as to whether the union represents the employees of the employer, either the union or the municipality may petition the board to conduct an election among said employees to determine whether they desire to be represented by a labor organization. Proceedings in representation cases shall be in accordance with ss. 111.02(6) and 111.05 insofar as applicable, except that where the board finds that a proposed unit includes a craft the board shall exclude such craft from the unit. The board shall not order an election among employees in a craft unit except on separate petition initiating representation proceedings in such craft unit.

This statutory authority is further implemented in the Wisconsin Administrative Code Section ERB Chapter 11 titled "Elections to Determine Bargaining Representatives and Appropriate Collective Bargaining Units Pursuant to Section 111.70 Wisconsin Statutes." Although the National Labor Relations Act provides that the NLRB conduct an investigation to determine whether a question of representation exists,⁴ under section 111.70(d) of the Wisconsin Statutes and Wisconsin Administrative Code Section ERB 11.02, no showing of interest is necessary. The Board has stated:

The Board has consistently held that no showing of interest is necessary for an initial petition since the statute requires none and no other authority exists for such a requirement. . . .⁵

⁴ National Labor Relations Act, §9(c).

⁵ Lincoln County, Wisconsin Employment Relations Board, Decision (WERB, Dec.) No. 6200, January, 1963. See also Eau Claire County Home and Mt. Washington Sanitorium, WERB, Dec. No. 6183, December, 1962.

The Board has also defined the nature of organizations capable of having representative status:

If the employe organization, regardless of its name, satisfied the Board that its purpose is to represent municipal employes in conferences and negotiations with municipal employers on questions of wages, hours and conditions of employment, such organization or its representative shall be considered by the Board to have the right, under appropriate circumstances, to become a party in any proceeding conducted by the Board pursuant to Section 111.70 of the Wisconsin Statutes.⁶

It is not necessary however for a labor organization to petition for a certification election if the municipal employer offers voluntarily recognition. The municipal employer however is restricted in that he may not show any favoritism to one particular labor organization over another:

Our determination in this proceeding does not establish that the Board is opposed to voluntary recognition of labor organizations by municipal employers where only one organization seeks recognition in a particular unit, and that organization is able to establish, in the absence of any reasonable doubt, that it in fact represents an uncoerced majority of the employes involved. . . .⁷

DETERMINATION OF BARGAINING UNIT

In order to determine the appropriate bargaining units and those employees that will be eligible to vote in these bargaining units, the board has adopted rules for conducting hearings with respect to these determinations.⁸ These board procedures are subject to review by the Circuit Court of the county in which the municipality is situated.⁹ The WERB has attempted in the past to have the labor organizations and employers submit lists with respect to those employees that should be placed within respective bargaining units:

Stipulations for elections and referendums are entertained by the Board in order to expedite the handling of such proceedings. To permit the parties to raise objections to the eligibility of voters after the conduct of the balloting would destroy the procedure so established for the expeditious processing of elections and referendums . . . when an employer and a union enter a stipulation for either an election or a referendum, and stipulate as to employes eligible to participate in such election . . . the Board will not disturb or amend such list of eligibles after the conduct of the balloting.¹⁰

⁶ Milwaukee Board of Vocational and Adult Education, WERB Dec. No. 6343, May, 1963.

⁷ City of West Allis, WERB Dec. No. 6544, November, 1963; See also Wisconsin Administrative Code Section ERB 11.02.

⁸ Wisconsin Administrative Code Section ERB 11.07 through 11.09.

⁹ Milwaukee County District Council 48 AFSCME v. WERB, 23 Wis. 2d 303, 127 N.W. 2d 59 (1964).

¹⁰ Menominee Sugar Company, WERB, Dec. No. 5657A, November, 1960; See also Marking Market, WERB, Dec. No. 6939B, February, 1965.

There is authority holding that an employer may not agree in advance with labor organizations for the exclusion of any particular position or person from the bargaining unit. In the event the municipality and employee organization cannot and/or will not stipulate with respect to the placement of employees in the various bargaining units, the WERB conducts hearings to make its own determinations.¹¹

Normally where several employee organizations are properly seeking certification as bargaining agents, the employee is given the choice on his ballot to vote for representation in a separate bargaining unit, representation in the overall bargaining unit or representation in no bargaining unit.

With respect to determination of the various bargaining units, the WERB has held that a majority of employees who are eligible to vote must vote in favor of establishing a separate unit:

In interpreting Section 111.06(2) the Board has previously stated that in order to establish a separate unit a majority of the employees eligible in the unit must vote in favor of the proposition. . . . The statutory language clearly establishes the requirement to be a majority of those employees eligible to vote rather than a majority of those voting. . . .¹²

These employees must, in addition, constitute themselves as a separate bargaining unit and be employed by the municipal employer in a separate division or department:

¹¹ Milwaukee County, WERB Dec. No. 7135, June, 1965 and WERB Dec. No. 7135A, August, 1965. An interesting question arises as to whether an Election Directive of the WERB (administrative order proceeding certification) may be reviewed by the Circuit Court of the County in which the municipality is located. Review is afforded by Section 227.15 of the Wisconsin Statutes as implemented by Section 227.16. The courts have held that only final orders of the WERB, which permanently fix the legal rights, duties or privileges, are subject to review. Although there is no Supreme Court authority concerning appeals of election directives, a determination of the eligibility of members to participate in an election was found not reviewable because it was not a final order. *Bakery Sales Driver Union Local 344 v. WERB*, Milwaukee County Circuit Court, Case No. 258-085 (1955). Supreme Court Justice Myron Gordon (then on the Circuit Court bench) wrote this decision intended to summarize the philosophy of the Wisconsin courts:

"A certification proceeding is of a nonadversary, fact finding character in which the board plays the part of a disinterested investigator seeking merely to ascertain the desires of the employees as to their representation. Direction of election falls short of being a 'final order.' I believe that the selection of the unit and the date of eligibility are not the 'administrative decisions' contemplated in Section 227.15 or the 'final orders' referred to in the Wisconsin Telephone Company case. I fully appreciate the effect on the petitioner of its being denied review of the board's conclusions. However, such conclusions are quite clearly a part of its 'ministerial,' 'interim' or 'preliminary' activities; while the petitioner's affairs may be sharply and adversely influenced by the board's conclusions it cannot be said that, in law, the board has rendered a final order or decision."

¹² *Normington Laundry*, WERB Dec. No. 3864, January, 1955; See also *City of Milwaukee*, WERB Dec. No. 6253B, April, 1963.

In order for the employees, otherwise eligible, to constitute themselves a separate bargaining unit they must be employed by the Municipal Employer in a separate division or department, and in order to establish the separate unit a majority of the otherwise eligible employees engaged or employed in that separate division or department must vote in favor of constituting themselves a separate collective bargaining unit. Since Section 111.70(4)(d) establishes craft employees as separate units the requirement with respect to craft employees as noted in Section 111.02(6) does not apply to craft employees employed by a municipal employer. . . .¹³

Rejection of a separate collective bargaining unit will occur when the majority of employees fail to vote in favor of such labor organization:

If the majority of employees fail to vote in favor of such labor organization then they will also be deemed to have rejected the separate collective bargaining unit.¹⁴

Thereafter this group of employees may either be represented by a labor organization seeking overall representation of all municipal employees or this group may not be included in any certified bargaining unit.¹⁵

REPRESENTATION OF SUPERVISORY, CONFIDENTIAL AND CRAFT EMPLOYEES

Wisconsin Statute Section 111.70 has made no provision for the exclusion of supervisory and confidential employees from the respective bargaining units. The WERB however has established authority for exclusions in these categories. The Board has determined certain guidelines with respect to determining whether the employees fall within these categories. Supervisory and confidential employees are considered agents of their municipal employer and therefore are not considered municipal employees within the meaning of Section 111.70(1)(b) of the Wisconsin Statutes:

The Board has not and will not consider confidential and supervisory employees as falling within the definition of municipal employees within the meaning of Section 111.70(1)(b) of the Wisconsin Statutes because of their alignment and relationship with the management. . . .¹⁶

The Board has further stated that to allow these supervisory and

¹³ City of Milwaukee, WERB Dec. No. 6252, August, 1962; See also Milwaukee County, WERB Dec. No. 7135, May, 1965 and WERB Dec. No. 7135A, August, 1965.

¹⁴ Lincoln County, WERB Dec. No. 6200, January, 1963; See also Appleton Water Commission, WERB Dec. No. 6075, August, 1962.

¹⁵ Milwaukee County, WERB Dec. No. 7135 and WERB Dec. No. 7135A, August, 1965.

¹⁶ Outagamie County Hospital, WERB Dec. No. 6076, August, 1962.

confidential employees within the bargaining unit would constitute not only a conflict of interest but also a breach of good faith bargaining:

Both Congress and the Wisconsin Legislature in enacting their respective labor acts recognized that there is a conflict between the interest of the employee and that of the employer, and they have also recognized that supervisory employees, for the most part, are agents of the employer, and thus are performing a management function. . . .

Good faith bargaining as envisaged by Section 111.70 requires that there be two parties confronting each other on opposite sides of the bargaining table. Supervisory personnel, because of their status with a municipal employer, could create the situation where the municipal employer would be dealing with itself if the supervisors were allowed to control the bargaining representative. The law abhors any possible conflict of interest or even a taint of conflict of interest. . . .¹⁷

With respect to supervisory employees, the Board has established certain criteria which are intended to be the guidelines in these determinations:

In determining whether an employee is a supervisor, the Board considers the following factors:

- (1) The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees.
- (2) The authority to direct and assign the work force.
- (3) The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees.
- (4) The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees.
- (5) Whether the supervisor is primarily supervising an activity or is primarily supervising employees.
- (6) Whether the supervisor is working supervisor or whether he spends a substantial majority of his time supervising employees.
- (7) The amount of independent judgment and discretion exercised in the supervision of employees.¹⁸

These criteria, however, are not binding: "The absence or presence of any one factor will not necessarily make the determination."¹⁹

A distinction has been recognized by the WERB between employees designated as supervisors whose primary responsibility is the supervision of an activity, such as a playground, rather than supervision of other personnel. These former employees are not excluded as supervisory under Wisconsin Statute Section 111.70. However, the WERB has made a determination that supervisory employees may maintain their union membership:

¹⁷ City of West Allis, WERB Dec. No. 6544, November, 1963.

¹⁸ City of Milwaukee, WERB Dec. No. 6960, December, 1964.

¹⁹ City of Wauwatosa, WERB Dec. No. 7106, April, 1965

However, there is nothing in Section 111.70 which provides that mere membership of supervisors in a labor organization contaminates that organization for purposes under the Statute. The fact that supervisory personnel are members of, or may hold office in, any labor organization subject to the provisions of Section 111.70 may raise a suspicion, but does not in itself establish domination or interference with the organization by the municipal employer employing such supervisory personnel. The number of supervisors among the membership of the organization and the ratio of the supervisors to other members are factors to be evaluated in each case. Likewise, the office held by supervisors and the extent to which they formulate the bargaining policy and programs in their labor organizations will also be scrutinized in each case.²⁰

This right of supervisory employees to maintain union membership is not absolute; where the bargaining union will be unduly influenced or the position of the municipal employer is jeopardized, the employee will be required to withdraw from union membership. It is significant to note that supervisory employees, because they are not employees within the meaning of Section 111.70(1)(b) of the Wisconsin Statute, are not entitled to participate in fact finding procedures under Wisconsin Statute Section 111.70(4)(e)(f)(g).

Our conclusion should not be understood as barring a municipal employer from voluntarily recognizing and bargaining with organizations representing supervisory employees. What we have said is that supervisory employees and organizations representing them do not have the right to proceed to fact finding under the Statute.²¹

Under the authority of this statement the WERB has indicated that although these employees are not entitled to fact finding as a matter of right, the municipal employer may voluntarily bargain with these employees.

In order to be excluded as a confidential employee, the nature of the confidence must involve matters pertaining to the employer-employee relationship in the particular department. The confidential relationship, therefore, has been used by the WERB in the sense of involvement in personnel matters and the formulation of personnel policies and not in security matters.²²

Craft employees in contrast to supervisory and confidential employees, although they are excluded from the normal bargaining unit,

²⁰ City of West Allis, WERB Dec. No. 6544, November, 1963.

²¹ City of Milwaukee, WERB Dec. No. 7069, March, 1965; See also Outagamie County Hospital, WERB Dec. No. 6076, August, 1962; City of Wausau, WERB Dec. No. 6276, March, 1963.

²² Winnebago County Hospital, WERB Dec. No. 6043, July, 1962; Eau Claire County, WERB Dec. No. 6145, October, 1962; Wausau Water Utility, WERB Dec. No. 6277, March, 1963; Middle River Sanitarium, WERB Dec. No. 6332, May, 1963; City of Wausau, WERB Dec. No. 6278, June, 1963.

may constitute themselves as separate bargaining units.²³ Normally these craft employees constitute individuals who have a substantial period of apprenticeship or comparable training. Employees will be considered to be engaged in a single craft when they are a distinct and homogenous group of skilled journeymen craftsmen working as such together with their apprentices and/or helpers.²⁴

Pursuant to the policy established by the Board in *Winnebago County Hospital* (Dec. No. 6043, 7/62) professional employees fall within the definition of the term "craft" and therefore cannot be included in an overall bargaining unit, as is provided in Section 111.70(4)(d). The fact that "craft" employees are excluded from bargaining units of other employees does not bar them from seeking representation by the same or other labor organizations in separate craft units, provided separate petitions are filed, therefore.²⁵

Craft employees also include professional employees such as nurses: ". . . professional employees who utilize their professional skills in their positions are 'craft' employees within the meaning of Section 111.70."²⁶

These professional employees shall be considered falling within the definition of the term "craft" within the meaning of Section 111.70(4)(d) of the Wisconsin Statutes where such employees have a substantial period of study and training to qualify for their professional status. Matters to be taken into consideration in determining whether or not an employee is a professional have been determined by the WERB on a case to case basis. The nature of the profession, training and duties performed by the employees will be considered as well as the extent to which the skills performed by them differ from the duties performed by other employees or the municipal employer.²⁷

PRE-ELECTION PERIOD AND CONDUCT OF ELECTION²⁸

The WERB has set forth the requirement of strict neutrality on the part of the municipal employer during this period:

²³ Because supervisory and confidential employees are excluded from any bargaining unit, they are not entitled to bargain with their municipal employer nor are they entitled to participate in fact finding. As a practical matter, however, the traditional across the board benefits in wages, hours and conditions of employment include these employees.

²⁴ *Winnebago County Hospital*, WERB Dec. No. 6043, July, 1962.

²⁵ *Outagamie County Hospital*, WERB Dec. No. 6076, August, 1962.

²⁶ *Winnebago County Hospital*, WERB Dec. No. 6042, July, 1962; See also *Wausau Utility*, WERB Dec. No. 6277, March, 1963; *City of Milwaukee*, WERB Dec. No. 6252, February, 1964; *Outagamie County Hospital*, WERB Dec. No. 6076, August, 1962.

²⁷ *Winnebago County Hospital*, WERB Dec. No. 6043, July, 1962; *City of Wausau*, WERB Dec. No. 6276, March, 1963.

²⁸ The WERB has set forth the administrative procedures for conducting elections, certifying the results thereof and noting objections in Wisconsin Administrative Code Section ERB Rules 11.08 through 11.11.

We believe it to be absolutely necessary that every municipal employer maintain strict neutrality when confronted with conflicting demands for recognition and it must, like Caesar's wife be 'above reproach' in its dealings with its employees. . . .²⁹

There have been numerous cases where municipal employers have been found to have violated Wisconsin Statute Section 111.70(3) by interfering with union activities.³⁰

Although the concept of free speech applies during the preelection period, the municipal employer may not make any threats against employees nor show any favoritism. The question frequently arises as to whether or not the municipal employer may contact his employees immediately before the election. The WERB has adopted a rule in private industry prohibiting employers from conducting meetings within 24 hours of any election:

Although the Respondent (Employer) at the meeting of employees three hours prior to the election did not make any threats or promises that would constitute an unfair labor practice, we deem the very fact that it called a meeting at such time to discuss the election of questionable propriety. For that reason, we feel it appropriate to adopt a rule prohibiting such meetings within 24 hours of any election or referendum. Campaign speeches on company time and premises delivered to gathered employees shortly before the voting creates an unfair advantage for the employer who is at liberty to call such a meeting. He can present his views in a convenient forum, where they will have the greatest psychological impact on the captive listeners. In such instances, the Union could with justification demand an equal opportunity to address a similar captive audience to present its views in the same charged atmosphere. The Board feels that such conditions tend to interfere with employees' calm and deliberate consideration of the issues upon which they are to vote.³¹

Prior to the 24-hour period, communications with employees are permissible providing there is no threat of reprisal or promise of reward.

The Board has determined certain campaign activities and propaganda as not permissible:

In *North Avenue Laundry* (Dec. No. 5716-B, 11/61) the board stated that it ordinarily will not pass judgment on campaign propaganda. We will not condone exaggerations, inaccuracies, partial truths, name calling and falsehoods, however, they may be excused as propaganda if they are not so misleading as to prevent a free choice by the employees. The reproduction of altered copies of the Board's official ballot by the Association

²⁹ City of West Allis, WERB Dec. No. 6544, November, 1963.

³⁰ Green Lake County, WERB Dec. No. 6061, July, 1962; Rock County Mental & County Home, WERB Dec. No. 6655, March, 1964; Joint District No. 1 of the Village of Waunakee, WERB Dec. No. 6706, April, 1964; St. Mary's Hospital, WERB Dec. No. 6779C, January, 1965.

³¹ Mt. Carmel Nursing Home, WERB Dec. No. 6352, May, 1963.

tended to interfere with a free choice in the election and was improper. We cannot, and shall not in the future, permit reproduction of any document purporting to be a copy of the official ballot of the Board unless such reproduction is an actual reproduction and is unaltered in form and content.³²

Further, the municipal employer may not deal with items concerning one particular union and not another as he must treat all unions in an identical manner.³³

Under Wisconsin Administrative Code Section ERB 11.08(2) either party may be represented by observers selected in accordance with such limitations as the board may prescribe. It is the preferable practice for both parties to designate someone other than their spokesman to supervise the balloting as the presence of these parties might cause undue influence on the results of the election.³⁴ Following the election, under Wisconsin Administrative Code Section ERB 11.10, any party may file with the Board objections to the conduct of the election or the results thereof within five days after the tally of the ballots has been furnished. The hearings procedure on the objection is set forth in Wisconsin Administrative Code Section ERB 11.11.

Upon the determination of the bargaining units the WERB in its election directive determines who will be excluded from these bargaining units as supervisory and confidential employees.

CERTIFICATION AND EXCLUSIVE REPRESENTATION

The WERB has held that any bargaining representative chosen under Section 111.70 of the Wisconsin Statutes by a majority of the bargaining unit shall be the exclusive collective bargaining representative for the purposes of engaging in conferences and negotiations with their municipal employer. The *Richland Center Utility*³⁵ case, established the distinction between the citizen's right to be heard with respect to employee matters and his right to bargain with his municipal employer; and made clear that although certification may deny the latter right, it does not deny the former. Under Wisconsin Administrative Code Section ERB 11.09 providing no timely objections are filed under Wisconsin Administrative Code Section ERB 11.10, the WERB shall issue to the parties a certification of the results of the election. It has been the policy of the board for the certification to remain in effect for one year:

It has been the policy of this Board, and we see no reason to deviate therefrom, generally not to require a showing of interest to the Board prior to the processing of an election petition. It has also been the policy of the Board that where an election had

³² St. Mary's Hospital, WERB Dec. No. 6779C, January, 1965.

³³ WIS. STAT. §111.70(3).

³⁴ St. Mary's Hospital, WERB Dec. No. 6779C, January, 1965.

³⁵ Richland Center Utility, WERB Dec. No. 5980, May, 1962.

been held, and where the petitioner was certified, that the certification of such election would remain in effect for at least one year before the new election was directed. The Board has deviated from this policy if it is satisfied that "sufficient reason" exists for the conduct of a second election during the "certification year."³⁶

NEGOTIATIONS REGARDING WAGES, HOURS
AND CONDITIONS OF EMPLOYMENT

The right of the labor organization to represent employees in conferences and negotiations with their municipal employers and their representatives on questions of wages, hours and conditions of employment is set forth under Wisconsin Statute Section 111.70(2). The policy of the WERB, whenever possible, has been to encourage collective bargaining:

Be that as it may, it must be remembered that it is now the policy of the State to encourage collective bargaining between Municipal Employers and their employes. As Administrators of Section 111.70 we will exercise the powers granted and perform the duties imposed by the Statutes. The Board will not nullify the legislative intent expressed by Section 111.70 by unreasonably denying resort to the procedures which are available under the Statute, including fact finding, for the purpose of carrying out the legislative intent of resolving municipal employer-employee disputes by collective bargaining. . . .³⁷

The employer's conduct following the election normally will indicate whether he intends to bargain in good faith:

We are also convinced that the Employer did not intend to engage in collective bargaining as contemplated in the Act. After the election the Employer engaged in delaying tactics to avoid its legal responsibility in this regard and at the same time attempted to weaken its majority status. The Employer's course of conduct following the election indicated an intent not to bargain in good faith with the Union up to the date of sale of its business. Such an intent was manifested by the stalling tactics of the Employer with regard to meetings with the Union, as well as the Employer's unilateral action in changing work schedules and other established working conditions.³⁸

After the determination has been made as to what items constitute wages, hours and conditions of employment under Section 111.70(2) of the Wisconsin Statutes, it is necessary for the municipal employer to determine whether he intends to bargain in closed sessions. Wisconsin

³⁶ St. Luke's Hospital, WERB Dec. No. 7007, January, 1965; See also Sheboygan Dairy Men's Cooperative, WERB Dec. No. 6986, April, 1946; Kress Packing Company, Inc., WERB Dec. No. 5581, August, 1960; Metro R. K. Inc., WERB Dec. No. 3780, August, 1954; Lakeside Industries, WERB Dec. No. 4610, September, 1957; Bellview, Inc., WERB Dec. No. 5793, July, 1961.

³⁷ City of Racine, WERB Dec. No. 6242A, March, 1963.

³⁸ Edgewater Enterprises, Inc., WERB Dec. No. 7097, April, 1965.

sin Statute Section 14.90 provides for open meetings of governmental bodies. Under the opinion of the Wisconsin Attorney General dated August 19, 1965,³⁹ a ruling was made that the municipality and labor organization may negotiate in closed sessions. This opinion is premised upon the fact that collective bargaining does not constitute a final determination to come within the provisions of Wisconsin Statute Section 14.90. The Attorney General stated: "Section 111.70 does not use the term 'bargaining,' but gives municipal employees the right to be represented in 'conference and negotiations.' It is, in effect, an investigation to try to ascertain what are the best terms which can be obtained from the parties on whose behalf the bargaining or negotiation is conducted."

The opinion stresses the necessity of closed meetings for effective bargaining:

The opportunity presented to investigate all aspects of a problem through preliminary negotiation might be handicapped by reluctance of representatives to express spontaneous reactions if their statements were given the same status as those of public officials made at public hearings.

The formal introduction, deliberation and adoption by the elected body of the bargaining recommendations must be at open meetings.

PROHIBITED PRACTICES

Wisconsin Statute Section 111.70(3) sets forth the various prohibited practices for municipal employers and municipal employees. These prohibited practices include interference by municipal employer or employees with respect to the exercise of the rights of each to participate in conferences and negotiations concerning wages, hours and conditions of employment and encouragement or discouragement of membership in any labor organization. It is a further prohibited practice for any person to attempt to influence the outcome of any controversy.⁴⁰

As set forth in Wisconsin Administrative Code Section ERB 12.02, the WERB does not investigate and prosecute prohibited practices. The party in interest must file the complaint. The moving party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.⁴¹ After the hearings are held, the WERB makes its findings of fact and conclusions of law. Under Section 111.70(4)(a) of the Wisconsin Statutes these findings are subject to review by the Circuit Court of the county in which the municipality is located.

Under the present wording in Wisconsin Statute Section 111.70(3) prohibited practices are concerned primarily with municipal employer-

³⁹ 65 OAG (August 19, 1965).

⁴⁰ Wis. STAT. §111.70(3)(a)(b).

⁴¹ Wis. STAT. §§111.70(4)(a) and 111.07; *Century Building Company v. WERB*, 235 Wis. 376, 291 N.W. 305 (1940); *UAW v. WERB*, 258 Wis. 481, 46 N.W. 2d 184 (1950).

employee pre-certification activities. Private industry in contract under Section 111.08 provides an extensive list of what are unfair labor practices. Due to the placement of the no strike provision in Section 111.70(4)(1) there is an interpretation problem as to whether a strike constitutes a prohibited practice.⁴² A strike is admittedly an illegal activity and the question of whether it constitutes a prohibited practice in which the WERB could participate has not been litigated to date.⁴³ Another potential area for a prohibited practice is the breach of the terms of an agreement between the municipal employer and employee. This constitutes an unfair labor practice in private industry under Section 111.06 of the Wisconsin Statutes.

Good faith bargaining requires the municipal employer and employees meet at reasonable times, confer and explain what and why items are offered and not offered. Good faith bargaining does not consist of making offers on a take it or leave it basis. A labor organization or municipal employer who fails to release all statistical information during the bargaining may be guilty of failure to bargain in good faith. This occurs when additional facts are presented to the fact finder. During the course of the negotiations when the parties appear at an impasse, under Section 111.70(4)(b) of the Wisconsin Statutes the WERB may function as a mediator in disputes between the parties upon the request of both parties. The WERB has interpreted the word "request" as both parties consenting to the mediation. Under an opinion of the Wisconsin Attorney General dated October 3, 1963, a ruling was made that the WERB in its function as mediator may hold closed mediation sessions. These sessions are intended to

⁴² Under Section 111.70(3), of the Wisconsin Statutes, prohibited practices are concerned primarily with interference with the rights bestowed in this Subchapter, encouraging or discouraging membership in any labor organization or attempting to influence the outcome of any controversy. In contrast to Wisconsin Statute Section 111.06, when an employer or union fails or refuses to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement, the aggrieved party must resort to fact finding under Section 111.70(4)(e) of the Wisconsin Statutes. Further, if the parties are deadlocked (reached an impasse) after a reasonable period of negotiation, they may resort to fact finding. Thus the WERB decisions interpreting prohibited practices under Wisconsin Statute Section 111.70(3), are largely concerned with activities which occur during the union organization campaign and subsequent certification election.

⁴³ Under Wisconsin Statute Section 111.70(4)(1), nothing in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are expressly prohibited. Despite this provision many employee organizations have forced their municipal employers to negotiate a "no strike" clause. Further, several unions have actually encouraged, threatened and carried out strikes. The problem arises in that the "no strike" provision is not contained in the prohibited practices section of Wisconsin Statute Section 111.70(3), and consequently it is questionable whether the WERB can or should become a party to an enforcement proceeding. If the WERB does not participate the municipality will find only injunctive relief in the courts. The effectiveness of such an injunction is a subject of debate.

assist the parties when they have reached an impasse in the bargaining process.

Although Wisconsin Statute Section 111.70 does not enumerate specific prohibited practices as extensively as the Wisconsin Peace Act and the National Labor Relations Act, the WERB will construe Section 111.70(3) broadly:

We also recognize the fact that the Wisconsin Employment Peace Act and the National Labor Relations Act provide greater enumeration and more specifically describe the standards of conduct for the treatment by the employer of his employees and vice versa than does Section 111.70. This Board in interpreting Section 111.70 shall consider any activity which interferes with, restrains, or coerces employees in their rights guaranteed in the statute whether specifically enumerated or not, as prohibited practices as long as such determinations do not conflict with any other provisions of Section 111.70.⁴⁴

Upon completion of negotiations, if a settlement is reached, the municipal employer shall reduce the same to writing either in the form of an ordinance, resolution or agreement pursuant to Section 111.70 (4)(i) of the Wisconsin Statutes. This is a statutory requirement and constitutes a symbol to the public employee organization of the union security.

FACT FINDING

Under Wisconsin Statute Section 111.70(4)(e)(f)(g), the procedures for fact finding are set forth. Fact finding under Section 111.70 is intended to replace the employee's right to strike in private industry. Therefore, when employees are participating in a strike, they are not entitled to participate in the fact finding procedures. The board has held:

The Legislature in adopting Section 111.70 authorized fact finding with public recommendations as an aid in the resolution of municipal employer-employee labor disputes, and as a substitute for the strike weapon utilized in private employment. The Legislature recognized that employment policies in municipal employment should be determined largely as a result of reasonable persuasion and negotiation rather than by the pressure generated as a result of a strike. The fact finding procedure set forth in the statute is designed to give representatives of municipal employees an opportunity to persuade the municipal employer and the public of the merits of their particular requests with reference to the wages, hours and working conditions of municipal employees. As administrators of this statute we do not believe that labor organizations, who ignore these considerations by engaging in a strike, should at the same time be entitled to the benefits of fact finding or other rights granted

⁴⁴ City of West Allis, WERB Dec. No. 6544, November, 1963.

to them by the statute. The Board as a general policy and in the absence of good cause shown will decline to process any fact finding petition filed by a labor organization which is engaged in a strike.⁴⁵

Fact finding may be initiated by either party when "after a reasonable period of negotiation," the parties are deadlocked or where either party fails or refuses to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement.⁴⁶ Petitions for fact finding should be filed pursuant to Wisconsin Administrative Code Section ERB 14.

The municipal employer, although he has the right to enact a local fact finding ordinance under Section 111.70(4)(m) of the Wisconsin Statutes, does not have the authority to determine whether conditions precedent to the initiation of fact finding exist:

We have, therefore, herein determined that the Board has exclusive jurisdiction under Section 111.70 to determine whether the conditions precedent to the initiation of fact finding exist.⁴⁷

The Board therefore in its sole discretion determines whether conditions precedent to fact finding exist:

We conclude that the term 'after a reasonable period of negotiation' prevents either of the parties from prematurely seeking fact finding without permitting an opportunity for collective bargaining. In this instance the period of collective bargaining was not terminated by any act of the union. Because of the time limitations for the adoption of its budget the Municipal Employer concluded bargaining and indicated a declination to participate in further meetings with representatives of the Union. Such refusal terminated the negotiations and the deadlock existed. While the period of negotiations was brief, we believe that it was sufficient to satisfy the statutory conditions for the initiation of fact finding. . . .⁴⁸

The Board has however indicated that fact finding should not be an automatic route in municipal collective bargaining:

As Counsel for the Union has argued, fact finding gives 'the test of daylight' to the request of the Municipal employees and the reasons and conclusions of the Municipal Employer in refusing to grant the requests. . . . As we have stated above, however, we do not consider this a perpetual obligation and wish to make it very clear to municipal employers and to representatives of municipal employees that the Board will not automatically grant a petition for fact finding whenever it finds that a municipal budget has been adopted without at the same time con-

⁴⁵ City of Milwaukee, WERB Dec. No. 6575B, December, 1963.

⁴⁶ WIS. STAT. §111.70(4)(e).

⁴⁷ City of Wauwatosa, WERB Dec. No. 7106, April, 1965; See also 51 OAG 90, May 18, 1962.

⁴⁸ City of Racine, WERB Dec. No. 6242A, March, 1963.

sidering the efforts which the parties have made to resolve their dispute. The most desirable practice would be for the parties to commence negotiations at a date early enough to allow a reasonable period of negotiation prior to the adoption of the municipal budget. We will not permit an automatic route to fact finding. Such a procedure would defeat its own purpose because the recommendations of the fact finder, in our view, are intended to assist the parties in reaching a settlement of their dispute through collective negotiations. If the fact finding procedure is regarded as an end in itself, it will detour collective bargaining and discourage the possibility of acceptance of the fact finder's recommendations of a settlement. . . .⁴⁹

Nor can the municipal employer refuse to further participate in bargaining sessions on the ground that the municipal budget is about to be adopted. In the *City of Racine* case the WERB held that despite the fact that the budget was submitted, changes in the compensation schedule can be made from the contingent fund and therefore the municipal employer could not hide behind the shield of a municipal budget.

In reaching this conclusion, the Board does not suggest that the Municipal Employer is obligated to grant the requests made by the Petitioner, but the Board does find that the Municipal Employer is not prohibited from doing so by reason of the statutes or ordinances cited. To adopt the argument of the Municipal Employer would encourage Municipalities to hide behind the shield of budget procedures to thwart the operation of collective bargaining and would frustrate the legislative intent in creating Section 111.70 of the Statutes.⁵⁰

In the *City of Racine* case, it was suggested on behalf of the municipal employer that the fact finder may not suggest changes to take effect in the future since the disagreement was only with respect to present wages. The WERB however held that:

Under the statute the fact finder is required to make recommendations for the solution of the dispute. The statute does not impose any limitations on recommendations for the solution of the dispute. To imply a prohibition against making recommendations to be applied in the future would hamstring and nullify the fact finding procedure. . . .⁵¹

It would, however, appear that in this area the municipal employer and municipal employee might arrive at an agreement with respect to the criteria to be adopted by the fact finders with respect to their cases. In the past the fact finders have used a wide variety of criteria for

⁴⁹ *Ibid.*

⁵⁰ *City of Racine*, WERB Dec. No. 6242, February, 1963.

⁵¹ *City of Racine*, WERB Dec. No. 6242A, March, 1963.

making determinations and this latter procedure might limit or restrict them to the actual issues involved.

Municipal employers have the authority to establish a local fact finding procedure under Section 111.70(4)(m) of the Wisconsin Statutes. This authority, however, does not permit the municipal employer to control fact finding procedures with respect to the fact finding commission:

While Section 111.70(4)(m) provides that the Wisconsin Employment Relations Board shall not initiate fact finding in cases where a municipal employer, through ordinance or otherwise, has established fact finding procedures substantially in compliance with the statute, we are certain that such provision does not permit the Municipal Employer to control fact finding procedures by unilaterally designating the fact finding commission, either to conduct a fact finding investigation and/or to appoint the fact finder. . . .⁵²

There is, however, a model local fact finding ordinance that has been approved by the WERB. This model local fact finding ordinance which was prepared by the Wisconsin League of Municipalities was approved in the *Shawano County* case:

The League of Wisconsin Municipalities has proposed a procedure for its members whereby the representatives of both the municipal employer and the municipal employees attempt to mutually agree on the selection of a third impartial person to act as a chairman of a three member fact finding panel and that, if said representatives are unable to agree on the third party, said third party shall be named by the American Arbitration Association. This procedure for the selection of a third party, in our opinion, meets the neutrality requirements and therefore is acceptable. . . .⁵³

It is, however, significant to note that local fact finding ordinances may clash with the WERB where the compensation is limited to a small amount. In the *City of Wauwatosa* case⁵⁴ the WERB stated that it would not designate a fact finder where the compensation was limited to \$50.00 per day. Under Wisconsin Administrative Code Section ERB 14.12, the compensation of the fact finder is set forth at not to exceed \$150.00 per day in hearing and not to exceed \$100.00 per day in preparation and issuance of his report.

Although fact finding under Wisconsin Statute Section 111.70 is not binding, in the initial fact finding proceedings a high percentage of cases have resulted in agreement and/or acceptance. Fact finding to date has been concerned primarily with wages although certain

⁵² *Shawano County*, WERB Dec. No. 6388, June, 1963.

⁵³ *Ibid.*

⁵⁴ *City of Wauwatosa*, WERB Dec. No. 7106, April, 1965.

cases have dealt with other matters including discharges, arbitration and a written contract. The average time taken to resolve impasses involving fact finding as of April, 1965, was nearly 10 months. The median cost of the proceedings was approximately \$500.00.⁵⁵

Section 111.70 of the Wisconsin Statutes does not establish any guidelines for fact finding determinations. As a result, the various fact finders have established numerous fact finding criteria.⁵⁶

These fact finders differ however with respect to the priority of such criteria. In all cases of fact finding, some wage increases have been given although sometimes this was so small that it did not justify the cost of the proceeding. It has been suggested that the WERB should establish a set of rules (criteria) upon which fact finding can be premised. The fact finder's criteria should be limited to the arguments

⁵⁵ Stern, James L. and Krinsky, Edward, Fact Finding Under Wisconsin Law (April, 1965).

⁵⁶ 1. Ability of Municipal Employer to Pay (*Town of Preble*, R. C. Seitz, October 15, 1962).

2. Wage Comparisons:

A. Same Job in Other Communities (*City of DePere*, David B. Johnson, June 1, 1963).

B. Other employees in same community (*City of DePere*, David B. Johnson, June 1, 1963).

C. Comparison of existing income with other employees in private employment in the same town (*Town of Preble*, R. C. Seitz, October 15, 1962).

D. Same levels of government (*Shawano County Highway Department*, E. L. Wingert, October 1, 1963).

E. Take home pay and overtime (*Pierce County Highway Department*, David B. Johnson, February 20, 1964).

F. Wage and cost of living squeeze (*City of Portage*, Robert J. Mueller, March 31, 1964 and Gordon Haferbecker, March 16, 1965).

G. Comparison of wage increase elsewhere (*Green County Highway Department*, Robert J. Mueller, April 15, 1964).

H. Wages given to other employees in same unit (*Green County Highway Department*, Robert J. Mueller, April 15, 1964).

I. Workers doing comparable job in other cities (Median and Average) (*Board of Education*, Eau Claire, E. L. Wingert, May 22, 1964).

J. Wage increase based on fact finder's opinion of what facts would be based upon free collective bargaining (*City of Watertown*, Philip G. Marshall, July 20, 1964).

K. Comparison of existing wages with median wages in other similar units of government (*City of Watertown*, Philip G. Marshall, July 20, 1964 and *City of South Milwaukee*, Thomas P. Whelan, August 29, 1964).

L. Social usefulness of workers compared with other workers receiving higher wages (*Racine County*, R. C. Seitz, September 4, 1964).

M. Educational requirements of Job (*Racine County*, R. C. Seitz, September 4, 1964).

N. Comparison of wages with other units of government in same city (*Wood County*, Robert J. Mueller, October 10, 1964).

O. Relationship existing in previous years with other cities (*City of Appleton*, Philip G. Marshall, November 20, 1964).

P. Education and training (*Janesville Board of Education*, R. C. Seitz, February 3, 1965).

Q. Comparison with cities of comparable size in Wisconsin (*City of Eau Claire*, David B. Johnson, November 9, 1964).

3. Productivity.

4. Cost of living (*City of Portage*, Robert J. Mueller, March 31, 1964 and Gordon Haferbecker, March 16, 1965).

5. Ability of recruitment (*City of Milwaukee*, R. C. Seitz, E. L. Wingert and Nathan P. Feinsinger, December 14, 1964).

set forth by the municipal employer and the labor organization during the course of negotiations.

JUDICIAL REVIEW OF THE WERB

Wisconsin Statute Section 111.70(4)(a) provides the specific appeal procedure with reference to prohibited practices. This section, however, does not specifically provide for review of a certification of bargaining representatives for municipal employees. However, the Wisconsin Supreme Court has interpreted Section 111.70 as providing for appeals in this area to the Circuit Court:

We . . . find no persuasive policy reason why a certification of a collective bargaining representative of municipal employees should not be subject to the same judicial review as in the case on non-municipal employees. . . . We conclude that judicial review in the manner provided in Ch 227, Stats., was available, and the circuit court had jurisdiction.⁵⁷

It would appear therefore that judicial review of the WERB in these areas will be vested in the Circuit Court of the county in which the party resides or transacts business.

CONCLUSION

Although at the time of this writing, Section 111.70 of the Wisconsin Statutes was only a few years old, the authorities cited in this article indicate a surprising number of court decisions with reference to interpretation of the law and the concept of fact finding. This article has been prepared for municipal officials that are confronted with employee elections, bargaining and fact finding for the first time. Before proceeding in this area, municipal officials should establish their own policies, procedures and objectives. Public employee organizations are continuing to grow in strength and size. The changing situation cannot be "wished away" but rather must be dealt with intelligently and effectively. Following these initial determinations, a careful study of the decisions and rulings should be made before proceeding with legislative changes and bargaining techniques.

⁵⁷ Milwaukee County District Council 48 AFSCME v. WERB, 23 Wis. 2d 303, 127 N.W. 2d 59 (1964).